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YOUNG & THOMPSON
209 Madison Street
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EXAMINER

BADR, HAMID R

ART UNIT	PAPER NUMBER
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1794

NOTIFICATION DATE	DELIVERY MODE
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01/06/2010

ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

DocketingDept@young-thompson.com

Office Action Summary	Application No. 10/574,352	Applicant(s) VIAUD, FLORENCE	
	Examiner HAMID R. BADR	Art Unit 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 09 November 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-24 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-24 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Applicants' amendment filed 11/09/2009 is acknowledged.

The rejections of claims 1-20, as set forth in the pending Office action, under 35 U.S.C. 112 second paragraph are withdrawn based on the amendments made by the applicants. New grounds of rejection, due to amendments, are set forth below.

Claims 1-24 are being considered on the merits.

Claim Rejections - 35 USC § 112

1. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

2. Claim 9 is rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. Claim 9 recites "co-kneader". While the instant specification supports "kneader", there is no support for "co-kneader".

3. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

4. Claim 23 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Art Unit: 1794

5. Claim 23 is indefinite for “a firmness of between 3N and 6N”. It is not clear what is meant by this phrase.

6. Claim 23 is indefinite for “a resilient of between 67% and 87%”. It is not clear what is meant by this phrase.

7. Claim 23 is indefinite for “a wherein of between 45% and 65%”. It is not clear what is meant by this phrase.

Claim Rejections - 35 USC § 103

8. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

9. Claims 1-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Brenton et al. (EP 0 815 737; hereinafter R1) in view of Karrazi (US 4,719,113; hereinafter R2).

10. R1 discloses a processed cheese made with yogurt. (Title).

11. R1 discloses a process where natural cheese is comminuted to provide particles of about 1.59-6.35 mm. The natural cheese is then combined with the dry ingredients in a blender. The natural cheese is use at a level from about 60% to 80% of the finished cheese product. (Col. 4, line 53 to Col. 5, line 10).

12. R1 discloses the types of cheeses which may be used in producing the processed cheese. Natural cheeses may be cheddar cheese, Swiss cheese, mozzarella

Art Unit: 1794

cheese, American type cheese (Col. 4, lines 5-12). Given the variety of cheeses discloses, the use of other types of cheese as presently claimed will be obvious to those of skill in the art. Such products will have various texture-flavor profiles.

13. R1 discloses that the natural cheese mixture is then heated in a jacketed mixer to about 72 C to 81C and held at that temperature for about 1-3 minutes. (Col. 5, lines 11-25).

14. R1 discloses that yogurt is added to the heated cheese mass. The yogurt is added at a level from about 2% to 20% by weight. After addition of yogurt, the temperature of the cheese mass is reduced to about 60C to 71C. (Col. 5, lines 46-50). It is also noted that a fermented product such as yogurt contains less than 30% dry matter as presently claimed.

15. R1 discloses that the mixture of cheese and yogurt is heated up to about 72-75C for about 60 seconds. The processed mass is then shaped into slices and cooled to about 7C (Col. 6, lines 40-46). Given that the cheese-yogurt mixture is heated up to a pasteurization temperature, it is obvious that a pasteurized product will be resulted.

16. R1 gives the details of a product wherein mozzarella cheese, cheddar cheese and yogurt are used to prepare a processed cheese. (Col. 6, Example 1).

17. Given that R1 discloses a fermented milk product such as yogurt containing live culture, incorporation of other fermented products containing live culture such as kefir, as presently claimed, will be obvious to those of skill in the art.

Art Unit: 1794

18. The incorporation of dried fruits, vegetables, nuts, pepper etc. into cheese products is also known in the art. Therefore, the incorporation of apricot pieces into the processed cheese, as presently claimed, will be obvious to those of skill in the art.

19. While R1 discloses a process and the resulting processed cheese in detail, it is noted that R1 does not disclose the cooling of the cheese mass before mixing with the yogurt product.

20. R2 discloses a yogurt food product having the consistency of cheese. (Abstract).

21. R2 discloses a process where the base ingredients are mixed and heated to about 82C. The base is then cooled to about 37C and yogurt is mixed with the cooled base. (Col. 2 line 50 to col. 3, line 19).

22. Given that the yogurt is added to the cooled base mixture, the process will have certain advantages namely; protection of the live culture in the added yogurt, prevention of curdling of yogurt at high temperature and low pH, and protection of the flavor imparted by yogurt to the finished product.

23. R1 discloses the process and the product where natural cheese may be mixed with yogurt to produce a processed cheese and R2 teaches of mixing the yogurt with a heated and cooled base mixture, therefore, it would have been obvious to one of ordinary skill in the art , at the time the invention was made, to follow the teachings of R1 up to the stage where the cheese base is prepared and cool the base before mixing in the yogurt as taught by R2. One would do so to protect the live culture in the yogurt, to protect the flavor and texture of the added yogurt. Absent any evidence to contrary

Art Unit: 1794

and based on the combined teachings of the cited references, there would be a reasonable expectation of success in making the processed cheese containing yogurt.

24. Claims 1-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Brenton et al. (EP 0 815 737; hereinafter R1) in view of Bodor et al. (EP 0 535 728; hereinafter R3).

25. R1 discloses a processed cheese made with yogurt. (Title).

26. R1 discloses a process where natural cheese is comminuted to provide particles of about 1.59-6.35 mm. The natural cheese is then combined with the dry ingredients in a blender. The natural cheese is use at a level from about 60% to 80% of the finished cheese product. (Col. 4, line 53 to Col. 5, line 10).

27. R1 discloses the types of cheeses which may be used in producing the processed cheese. Natural cheeses may be cheddar cheese, Swiss cheese, mozzarella cheese, American type cheese (Col. 4, lines 5-12). Given the variety of cheeses discloses, the use of other types of cheese as presently claimed will be obvious to those of skill in the art. Such products will have various texture-flavor profiles.

28. R1 discloses that the natural cheese mixture is then heated in a jacketed mixer to about 72 C to 81C and held at that temperature for about 1-3 minutes. (Col. 5, lines 11-25).

29. R1 discloses that yogurt is added to the heated cheese mass. The yogurt is added at a level from about 2% to 20% by weight. After addition of yogurt, the temperature of the cheese mass is reduced to about 60C to 71C. (Col. 5, lines 46-50). It

Art Unit: 1794

is also noted that a fermented product such as yogurt contains less than 30% dry matter as presently claimed.

30. R1 discloses that the mixture of cheese and yogurt is heated up to about 72-75C for about 60 seconds. The processed mass is then shaped into slices and cooled to about 7C (Col. 6, lines 40-46). Given that the cheese-yogurt mixture is heated up to a pasteurization temperature, it is obvious that a pasteurized product will be resulted.

31. R1 gives the details of a product wherein mozzarella cheese, cheddar cheese and yogurt are used to prepare a processed cheese. (Col. 6, Example 1).

32. Given that R1 discloses a fermented milk product such as yogurt containing live culture, incorporation of other fermented products containing live culture such as kefir, as presently claimed, will be obvious to those of skill in the art.

33. The incorporation of dried fruits, vegetables, nuts, pepper etc. into cheese products is also known in the art. Therefore, the incorporation of apricot pieces into the processed cheese, as presently claimed, will be obvious to those of skill in the art.

34. While R1 discloses a process and the resulting processed cheese in detail, it is noted that R1 does not disclose the cooling of the cheese mass before mixing with the yogurt product.

35. R3 discloses processed cheese products wherein unripened cheese is heated at below pasteurization temperature to ensure bacterial culture survival. (Abstract).

36. R3 disclose a heating range of 35-65C for no longer than 10 minutes and preferably 5 minutes. (page 8, lines 1-25).

37. R3 uses mozzarella cheese in Example 1. (page 8, Example 1).

Art Unit: 1794

38. Given that a low temperature process, to protect the live bacterial culture, is disclosed by R3, it would be obvious to cool down the heated cheese mixture of R1 before adding the live culture containing yogurt to protect the live bacterial culture when mixed with the cheese base.

39. R1 discloses the process and the product where natural cheese may be mixed with yogurt to produce a processed cheese and R3 teaches of processing the processed cheese at low temperature to protect the bacterial culture, therefore, it would have been obvious to one of ordinary skill in the art, at the time the invention was made, to follow the teachings of R1 up to the stage where the cheese base is prepared and cool the base before mixing in the yogurt to protect the live culture as taught by R3. One would do so to protect the live culture in the yogurt. Absent any evidence to contrary and based on the combined teachings of the cited references, there would be a reasonable expectation of success in making the processed cheese containing yogurt.

Response to Arguments

Applicants' arguments have been carefully reviewed. These arguments are not deemed persuasive for the following reasons.

1. Applicants argue that Brenton (R1) discloses heating to about 72C to 81C and holding for 1-3 minutes at that temperature, and that Brenton fails to teach heating the cheese mass to a temperature of between 60C to 70C as required by the present claims.

Art Unit: 1794

a. Brenton recites "about 72C". This means that the temperature can be 68C-74C. Therefore it is clear that the disclosed temperature range, by Brenton, and the claimed range overlap. This overlap is sufficient for obviousness.

Generally, differences in concentration or temperature will not support the patentability of subject matter encompassed by the prior art unless there is evidence indicating such concentration or temperature is critical. "[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation." In re Aller, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955)

Further, As set forth in MPEP 2144.05, in the case where the claimed range "overlap or lie inside ranges disclosed by the prior art", a *prima facie* case of obviousness exists, In re Wertheim, 541 F.2d 257, 191 USPQ 90 (CCPA 1976); In re Woodruff, 919 F.2d 1575, 16 USPQ2d 1934 (Fed. Cir. 1990).

2. Applicants argue that Karrazi (R2) discloses the cooling of the heated mass, however, R2 does not recognize any advantages such as protection of live culture, prevention of curdling of yogurt at high temperature and low pH and protection of the flavor imparted by yogurt.

a. All of these advantages are known to the skilled artisan. Furthermore, protection of the live culture contained in yogurt, will be inherent in the process wherein the heated mass is cooled to the temperature range as disclosed by R2 and yogurt is mixed into the cooled mass. Therefore, cooling the heated cheese mass before adding the yogurt component is within the skill of the art.

Art Unit: 1794

3. Applicants argue that Bodor (R3) discloses a range of 35C-65C for the bacterial culture in the unripened cheese to survive the process.

a. Bodor is disclosing a temperature range which can protect the bacterial culture. This teaching is obviously adopted to protect bacterial culture of yogurt when it is mixed with other component. The survival of the bacterial culture through monitoring the temperature is clearly disclosed by Bodor.

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

Conclusion

40. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any

Art Unit: 1794

extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to HAMID R. BADR whose telephone number is (571)270-3455. The examiner can normally be reached on M-F, 8:00-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Hamid R Badr
Examiner
Art Unit 1794

/Keith D. Hendricks/
Supervisory Patent Examiner, Art Unit 1794